BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Eligibility of: MARSHALL O., Claimant, and THE ORANGE COUNTY REGIONAL CENTER, Service Agency.	OAH No. L-2005120626

DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on February 1, 2006, in Santa Ana, California.

Claimant Marshall O. was represented by Brian Allen, Advocate, but he was not present during any portion of the fair hearing. James O., claimant's father, and Tisa O., claimant's mother, were present throughout the fair hearing.

Mary Kavli, Program Manager, Fair Hearings and Mediations, Regional Center of Orange County, represented the service agency.

The matter was submitted on February 1, 2006.

ISSUES

Is Marshall O. eligible to receive regional center services and supports by reason of a substantially handicapping developmental disability involving an autistic disorder?

Is Marshall O. entitled to an additional assessment to determine if he is eligible for regional center services and supports based on the evidence offered in the course of the fair hearing?

FACTUAL FINDINGS

Jurisdictional Matters

1. On December 14, 2005, claimant (claimant or Marshall O.), through Brian Allen (Allen), his advocate, filed an appeal and requested a fair hearing to contest the Regional Center of Orange County's determination that claimant was not a developmentally disabled person under Welfare and Institutions Code section 4512.

2. On February 1, 2006, the record in the fair hearing was opened. Jurisdictional documents were presented, sworn testimony and documentary evidence was received, closing arguments were given, the record was closed, and the matter was submitted.

3. Claimant argued the preponderance of the evidence established he was properly diagnosed with Asperger's syndrome and/or another substantially disabling autistic disorder which made him eligible to receive services and supports from the Regional Center of Orange County.

The Regional Center of Orange County disagreed, contending the competent evidence did not establish the presence of a qualifying developmental disability or the existence of a substantial disability.

The Lanterman Act

4. The Lanterman Developmental Disabilities Services Act (Lanterman Act), found at Welfare and Institutions Code section 4500 et seq., was enacted more than two decades ago. Welfare and Institutions Code section 4501 states:

> "The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors and whole communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance . . .
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> An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities."

5. Welfare and Institutions Code section 4512, subdivision (a) defines "developmental disability" as follows:

> "'Developmental disability' means a disability which originates before an individual attains age 18, continues, or can be expected to continue indefinitely, and constitutes a substantial disability . . . As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature."

6. California Code of Regulations, title 17, section 54000 provides:

> "(a) 'Developmental Disability' means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.
>
> (b) The Developmental Disability shall:
>
> (1) Originate before age eighteen;
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> (2) Be likely to continue indefinitely;
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> (3) Constitute a substantial disability for the individual as defined in the article.
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> (c) Developmental Disability shall not include handicapping conditions that are:
>
> (1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.
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> (2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

7. California Code of Regulations, title 17, section 54001 provides:

"(a) 'Substantial disability' means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;
(B) Learning;
(C) Self-care;
(D) Mobility;
(E) Self-direction;
(F) Capacity for independent living;
(G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible."

Autism

8. "Autism" is a term that identifies a neurodevelopmental syndrome that

is defined by deficits in social reciprocity, impaired communication and unusual restricted, repetitive behaviors. Many, but not all, individuals who are diagnosed with autism also have a diagnosis of mental retardation. Most, but not all, individuals who are diagnosed with autism have a history of language delay. Some, but not all, individuals who are diagnosed with autism have a seizure disorder. All individuals who are diagnosed with autism have some disturbance of normal social behavior and have some impairment in communication skills.

Autism typically has an onset no later than three years of age. Though many social deficits may not be immediately obvious in early life, these deficits gradually become evident as the autistic child becomes mobile and as other children become more socially sophisticated.

In the last 20 years, autism has been conceptualized as a spectrum disorder under the diagnostic umbrella of Pervasive Developmental Disorder. More specific diagnoses included in the *Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition* (the DSM-IV) include Autistic Disorder, Asperger's Disorder, Pervasive Developmental Disorder – Not Otherwise Specified, Rett's Disorder and Childhood Disintegrative Disorder. Distinctions between these disorders basically depend upon the degree of language deficit, the general cognitive delay and/or the severity of the social or behavioral symptoms.

The number of persons who have been diagnosed with autism has increased dramatically in the past 20 years. The expansion of the diagnostic framework to include milder forms of the disorder, growing and more sophisticated groups of scientists and health care professionals specializing in the disorder, an increased detection rate, the greater availability of services and supports for persons diagnosed with autism, expanding parent and community support groups, and heightened public awareness have contributed to this growth.

9. A review of the *Diagnostic and Statistical Manual of Mental Disorders* over the last four decades illustrates the evolution of "autism."

The *DSM-II*, published in 1968, did not refer to "autism," "autistic disorder," "pervasive developmental disorder" or "Asperger's Disorder."

The *DSM-III*, published in 1980, referred to "pervasive developmental disorders" including "infantile autism" and "childhood onset pervasive developmental disorder." The term "Asperger's Disorder" did not appear in the *DSM-III*.

The term "Autistic Disorder" first appeared in *DSM-III-R*, published in 1987, but the term "Asperger's Disorder" did not.

In the *DSM-IV*, first published in May 1994, contained the terms "Autistic Disorder" and "Asperger's Disorder" to identify two of the five pervasive

developmental disorders. The term "Infantile Autism" was abandoned in the *DSM-IV* revision in favor of "Autistic Disorder" (*DSM-IV-TR* Code 299.00).

10. Individuals mildly affected by autism may exhibit only slight delays in language skills and may have minimal difficulties in meeting social challenges. In others whose autistic symptoms are more pronounced, the presence of the disorder is unmistakable, often involving no communication or interaction with others, an all-encompassing interest in a particular subject and/or the presence of stereotypical body movements such as rocking or swaying.

"Autism" and the more specific diagnoses contained in the *DSM-IV* (see, Factual Finding 12) are not terms used to describe rowdy or uncommunicative persons. Because the cause(s) of autism have yet to be identified, there is no known medical "cure." Certain coping mechanisms and strategies have been developed; some autistic persons utilizing these mechanisms and strategies appear to the untrained person to no longer have autism.

Whatever the cause of autism may be, it is not the result of bad parenting. There is no medical or laboratory test to diagnose autism – it is primarily a clinical diagnosis.

11. Because autism can be a difficult diagnosis, its presence might not be appreciated by a treating pediatrician when an autistic person is an infant or a toddler. Sometimes the diagnosis occurs much later in life. The failure to make a diagnosis of autism by four or five years of age does not rule out the existence of the disorder.

An interdisciplinary team including a neurologist, a psychologist, a pediatrician, a speech/language therapist, a learning consultant and other professionals who are familiar with and knowledgeable about pervasive developmental disorders often make the diagnosis.

12. The five recognized autistic spectrum disorders are:

Autistic Disorder: A disorder characterized by impairments in social interaction, communication and imaginative play before three years of age, featuring stereotyped behaviors and restricted interests and activities.[1]

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[1] The *DSM-IV-TR* states:

> "Individuals with Autistic Disorder have restricted, repetitive and stereotyped patterns of behavior, interests and activities. There may be an encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus; an apparently inflexible adherence to specific nonfunctional routines or rituals, stereotyped and repetitive motor mannerisms; or a persistent preoccupation with parts of objects. Individuals with Autistic Disorder display a markedly restricted range of interests and are often preoccupied with one narrow interest (e.g., with amassing facts about meteorology or baseball statistics). They may

Asperger's Disorder: A disorder characterized by impairments in social interaction and by the presence of restricted interests and activities, but with no clinically significant delay in language and with intelligence testing in the average to above average range.[2]

Pervasive Developmental Disorder – Not Otherwise Specified: A disorder commonly referred to as atypical autism, a diagnosis of PDD-NOS is provided when a child does not meet the criteria for a specific diagnosis, but severe and pervasive impairments in specified behaviors nevertheless exist.

Rett's Disorder: A progressive disorder involving a period of normal development followed by the loss of previously acquired skills, including the loss of purposeful use of the hands replaced with repetitive hand movements, usually beginning at one to four years of age, found only in females.

Childhood Disintegrative Disorder: A disorder that is characterized by normal development for at least the first two years, followed by a significant loss of previously acquired skills.

Asperger's Disorder

13. Autism, and more particularly Asperger's Disorder, was not widely recognized until the mid-1990s. Before then, it was very common for a child with Asperger's Disorder to be diagnosed with ADD, ADHD or a specific learning disability. The signs and symptoms which are now associated with high functioning autism were often misinterpreted.

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line up an exact number of play things in the same manner over and over again or repetitively mimic the actions of a television actor. They may insist on sameness and show resistance to or distress over trivial changes (e.g., a younger child may have a catastrophic reaction to a minor change in the environment such as a new set of curtains or a change in place at the dinner table). There is often an interest in nonfunctional routines or rituals or an unreasonable insistence on following routines (e.g., taking exactly the same route to school every day). Stereotyped body movements include the hands (clapping, finger flicking) or the whole body (rocking dipping, and swaying . . ."

The *DSM-IV-TR* notes, "Individuals with Autistic Disorder may have a range of behavioral symptoms, including hyperactivity, short attention span, impassivity, aggressiveness, self-injurious behaviors, and, particularly in young children, temper tantrums."

[2] It appears that children with Asperger's Disorder were not properly diagnosed until relatively recently. Asperger's Disorder is a neurobiological disorder named for a Viennese physician, Hans Asperger, who in 1944 published a paper describing a pattern of behaviors in several young boys who had normal intelligence and language development, but who exhibited autistic-like behaviors and marked deficiencies in social and communication skills. In spite of the publication of the paper it was not until 1994, when Asperger's Disorder was added to the *DSM-IV*, that the disorder became generally recognized by professionals and the public.

Parents and educators of minimally autistic children often accommodated themselves and the child's environment to the disorder. With parents, especially those who had no prior experience with infants and toddlers, a certain amount of ignorance and denial resulted in misreporting or nonreporting.

However, within the past 15 years, the diagnosis of autism, and more particularly the diagnosis of Asperger's Disorder, has escalated, replacing ADD and ADHD as a favored diagnosis. The *DSM-IV-TR* notes it "remains unclear whether the higher reported rates reflect differences in methodology or an increased frequency of the condition."

Enormous benefits have become available to persons diagnosed with "autism." Because of this, parents and caretakers of children and others demonstrating abnormal social behaviors and inadequate communication skills sometimes actively seek a diagnosis of "autism" or a more specific autistic spectrum disorder to explain odd behaviors and to obtain substantial benefits for their loved ones.

There remains a substantial disagreement among reputable professionals in the field of autism about exactly what delays and behaviors warrant a diagnosis of autism. Sometimes the disagreement relates to the "facts" of early childhood – the nature and extent of developmental delays, if any, and the presence of behaviors that were or were not inconsistent with autism – as well as the clinician's interpretation of the historical information.

Issues of selective perception, secondary gain and the well meaning but suggestive influences of parents and clinicians who present and obtain historical information are frequently presented in determining whether a diagnosis of autism is warranted, even though the childhood historians and the diagnostic clinicians have acted in good faith. For these and other reasons, anecdotal information concerning a particular childhood history should be corroborated to the greatest extent possible by documentation independent of any effort to establish or refute a diagnosis of autism.

Claimant's Developmental and Educational History

14. Claimant was born in Fresno, California, on August 10, 1997, following a full-term pregnancy which involved some toxemia of pregnancy. Claimant was delivered via a Caesarian section. No birth defects were apparent at birth. Claimant was the first of James and Tisa O.'s three children. Claimant has a four year old sister and a two and a half year old brother.

According to claimant's father, there were some concerns about claimant's developmental progress when he was about one and a half years old, which included lisping, not combining many words together, possible speech regression, and focusing on insignificant matters for what seemed an inordinately long period of time. Claimant was not referred to or evaluated by any professional for these concerns. He

was seen by a Fresno pediatrician every six months or so until he moved with his parents to Southern California. The Fresno pediatrician reportedly told claimant's parents that claimant's speech was "a little off" but there "was no cause for concern" they "should keep an eye on it."

Claimant arrived in Southern California when he was about two years of age. He came under the care of a Fullerton pediatrician, Dr. Robert Sharp, who evaluated claimant at a well-baby clinic every six months or so. According to claimant's father, Dr. Sharp expressed some concern about claimant's speech, but he made no specific recommendations. Claimant's father also testified Dr. Sharp had some concerns about the development of claimant's motor skills. Dr. Sharp did not diagnose claimant with autism, Asperger's Disorder, or any pervasive developmental disorder. Claimant was very active and impulsive. Dr. Sharp diagnosed claimant with Attention Deficit Hyperactivity Disorder (ADHD), a behavioral disorder not on the autistic spectrum whose principal characteristics include inattention, hyperactivity and impulsivity.

Claimant's father changed employment, which resulted in claimant coming under the care of Dr. Marc W. Bennett, an Orange pediatrician, when claimant was about four years old. Claimant's father thought Dr. Bennett had access to Dr. Sharp's records concerning claimant. Dr. Bennett did not diagnose claimant with Asperger's Disorder until August 29, 2005, and the circumstances surrounding that diagnosis are discussed below in Factual Finding 19.

15. Claimant began kindergarten on a limited day schedule due to concerns about his behavioral problems. He was retained in kindergarten due to his immaturity and was then enrolled in first grade.

Claimant began first grade in fall 2004. Claimant's classroom teachers and other educators reported concerns including his difficulty sitting, maintaining a calm body, following general classroom rules, disorganization, impulsiveness, disruptive behavior, poor peer relationships including teasing and aggression, interrupting the classroom, leaving his seat, and being off task. These concerns resulted in a thorough psychoeducational assessment.

16. In November 2004, a school psychologist compiled a thorough report concerning the psychoeducational assessment, whose purpose was to evaluate the causes of claimant's behavioral problems. In the historical background portion of the report, claimant's diagnosis of ADHD was noted. There was no mention of autism or Asperger's Disorder.

Various psychoeducational assessments were administered including the Weschler Intelligence Scale for Children – Fourth Edition (WISC-IV), the Motor Free Visual Perception Test (MVPT), the Test of Auditory-Perceptual Skills-Revised (TAPS-R), a formal speech and language assessment, the Bender-Gestalt, the

Asperger Syndrome Diagnostic Scale (ASDS), the Behavior Assessment System for Children (BASC), the Connors Rating Scales, and a structured interview.

WISC-IV intelligence testing was considered to be within normal limits and demonstrated a Full Scale IQ of 102. The MVPT, a measure of visual perception, was considered to be within normal limits. The TAPS-R, a measure designed to assess such areas as the ability to repeat numbers and discriminate differences in similar sounding words, was within the average range. The results of the Bender-Gestalt, an unstructured pen and paper task used to evaluate visual motor integration skills, were below average. In the ASDS, a screening device which was completed by a teacher and claimant's father, the results varied: the teacher's pattern of responses suggested claimant's probability of Asperger Syndrome fell within the "possible" range while the father's pattern of responses suggested claimant's probability of Asperger Syndrome fell within the "unlikely" range. In the BASC, which was administered to a teacher and to claimant's parents, there was some divergence in the results: the teacher's pattern of responses indicated a high level of hyperactivity and aggression and low levels of adaptability and social skills, which resulted in claimant falling in the "at-risk" range; the parents' response indicated concerns about hyperactivity, aggression and conduct problems in the "clinically significant" range. However, claimant did not appear to fit the "emotional disturbance" criteria required for a student to qualify for special education under state guidelines. The Connors Rating Scales, which is useful in identifying characteristics consistent with ADHD or an Oppositional Defiance Disorder, were completed by a teacher and the parents: the teacher's responses indicated the ADHD index was moderately atypical and was of significant concern, while oppositional behavior and hyperactivity levels were markedly atypical and of significant concern; the parents' responses indicated cognitive problems/inattention were minor concerns, but oppositional behavior, hyperactivity, and ADHD levels were markedly atypical and were areas of very significant concern.

In the assessments and during the interview, claimant displayed inconsistent eye contact and poor social skills, but he did not engage in repetitive, ritualistic or self-stimulating behaviors or mannerisms, which are common in persons with disorders on the autistic spectrum. Claimant did not perseverate on any topics or demonstrate a narrow range of interest, which is common in persons with disorders on the autistic spectrum. Claimant used language effectively to communicate and he was observed interacting and playing with others, which is uncommon behavior for persons with disorders on the autistic spectrum.

While claimant's self-help and adaptive skills were not formally measured, they appeared to the evaluators to be within normal limits according to the report.

17. Claimant was observed in the classroom several times between November and December 2004 by a behavior consultant employed by the Orange Unified School District. The behavior consultant also spoke with members of the

student study team. The behavior consultant determined claimant was a bright child who was aware of his surroundings and interacted with his peers. Claimant seemed to enjoy academic lessons and he made appropriate comments during group discussions. However, claimant engaged in disruptive, attention-seeking behaviors on a frequent basis. The consultant noted the positive interventions were currently in place, and suggested the implementation of several other interventions to build skills and prevent unproductive, aggressive, challenging behaviors.

The behavior consultant's report did not mention the possibility of autism or Asperger's Disorder.

18. A speech and language assessment was conducted by a speech and language specialist in November 2004 as a part of the school district's comprehensive evaluation. The specialist spoke with claimant and his parents and claimant, took a health and developmental history, a medical history, conducted a physical assessment, and administered many speech and language tests.

According to the speech and language specialist, claimant demonstrated the ability to maintain eye contact, took turns appropriately and answered questions in a relevant manner. Claimant used complete and complex sentences appropriately and intelligibly. He used logical sequences to explain, narrate, and describe events and likes and dislikes. Claimant demonstrated significant lateral lisp in conversation, creating a marked speech distortion.

In formal testing, claimant demonstrated above average abilities in understanding and using semantics, syntax, and receptive and expressive language. While he was somewhat uncooperative in the first testing session, he demonstrated excellent attention and performance over the remaining days of testing.

The speech and language assessment did not mention the possibility of autism or Asperger's Disorder.

19. The Individualized Education Plan (IEP) effective January 3, 2005, indicated a primary handicapping condition of "other health impaired." The box for "Autistic" was not checked. ADHD was not mentioned. Claimant was referred for speech and language therapy and occupational therapy. Four percent of his school time was allocated to special education.

Claimant's parents and Allen (who was claimant's advocate in the educational matter) requested a hearing because they disputed the IEP's conclusions and the placement recommendations related to occupational therapy set forth in the IEP.

The IEP was reviewed and a revised IEP was prepared. That IEP, which became effective on January 26, 2005, included a primary handicapping condition of "other health impaired" and significant health information including "ADHD." It did

not contain a primary handicapping condition of "Autistic." It did not mention "Asperger's Disorder" or any other diagnosis on the autistic spectrum. Four percent of claimant's school time was in special education and 96 percent of his time was in regular education.

The IEP was reviewed and a revised IEP was prepared. That revised IEP had an effective date of September 29, 2005. Again, the primary handicapping condition was "other health impaired" and ADHD was listed as a significant health matter. The impact of the disability was described as "Deficits in attention and hyperactivity impede learning." Fifteen percent of the school time involved special education services and 85 percent of the services were "regular education."

A typewritten document attached to the most recent IEP was entitled "Parental Concerns and Issues" and was signed by claimant's parents. It set forth a request that claimant be "diagnosed with Aspergers syndrome which is part of the Autism Spectrum Disorder which is diagnosed by the doctor on August 29, 2006."

20. Claimant's father, who is employed in the information technology field and has a bachelor's degree in Psychology from California State University Fresno, testified he and claimant's mother began actively searching for something to better explain claimant's symptoms and behaviors in early 2005. After researching the matter, claimant's mother came to believe that "high functioning autism" and "Asperger's Disorder" were probably accurate descriptions of her son's condition.

In late winter or early spring 2005, claimant's mother approached Dr. Bennett and asked if he thought claimant should be diagnosed with autism or Asperger's Disorder. Dr. Bennett told her he could not make such a diagnosis without further information. Evidently Dr. Bennett referred claimant for some type of testing, which claimant's father could not describe. The results of the testing (if any) were not given to the school district or the parents and were not produced.

On a prescription form dated 8-29, Dr. Bennett wrote:

> "Marshall has Asperger's Syndrome which is part of the <u>Autism</u> <u>Spectrum Disorder</u>." (Original emphasis.)

The basis for Dr. Bennett's diagnosis was not explained on the prescription form or in any other documentation offered at the fair hearing. Dr. Bennett's records were not produced. Dr. Bennett did not testify.

21. On March 31, 2005, claimant was evaluated at Newport Language and Speech Centers by Meghan Spencer, SLS, CFY and Nancy Pohlor, MA, CCC, who were described in the initial evaluation as "clinicians." Dr. Bennett was noted to be the physician, but his input into the evaluation was not established.

"Autism" was listed under the "Medical Diagnosis" portion of the initial evaluation. The source of that diagnosis and the basis of that diagnosis were not established. The "Clinical Diagnosis" set forth in the initial evaluation, which presumably was reached by the clinicians, was "Mild speech production impairment, mild social language impairment.

The background information portion of the report stated the mother's primary concern was claimant spoke too fast, lisps sometimes, and was hard to understand." The report stated, "Developmental milestones were reportedly met at appropriate times; however, exact ages could not be recalled." Claimant's mother stated there was "a significant history of Asperger's in their family" and that claimant's father was recently diagnosed with that disorder, as well as two of claimant's cousins.

The "clinical impressions" portion of the evaluation indicated claimant was a talkative boy "diagnosed with autism" who was exhibiting a mild speech production impairment. Standardized receptive and expressive language scores on formal testing were within normal limits, but whose tantrums, impulsivity and decreased attention reportedly hindered his performance at school and at home. Again, the source of the "autism" diagnosis was not disclosed.

The clinicians recommended claimant obtain one hour speech therapy sessions twice a week for 60 days.

22. A completed referral authorization form from claimant's father's health care plan was introduced. That referral authorized speech therapy services for claimant from Newport Language and Speech Centers from September 6, 2005 through December 5, 2005.

The completed referral form contained diagnoses of "299.00 Infantile Autism" and "315.33 Speech/Language Dis." However, while most of the form was typewritten, the diagnoses were handwritten. Claimant's mother and father had no idea who wrote in the diagnoses on the form.

The referral form was completed before Dr. Bennett provided claimant's mother with a prescription form which diagnosed claimant with Asperger's Disorder.

23. In the Newport Language and Speech Center's progress report through August 22, 2005, the Medical Diagnosis was listed as "Unknown." The reason the prior diagnosis of "Autism" was abandoned was not established.

The Service Agency's Assessment

24. On October 4, 2005, claimant's mother contacted the Regional Center of Orange County (the service agency) following a referral from the school district on the basis that Dr. Bennett had diagnosed claimant with Asperger's Disorder.

On October 10, 2005, claimant's chart was received and telephone contact was made with the family. An intake interview was rescheduled to accommodate Allen's schedule.

On October 27, 2005, Lori Burch (Burch), Senior Service Coordinator, met with claimant, claimant's father and claimant's advocate. Burch has a bachelor's degree in Psychology from UCSB, a master's degree in Applied Behavioral Science from Southern Illinois University. She has been employed by the service agency for 20 years. She was and is very familiar with the characteristics and behaviors of persons diagnosed with disorders on the autistic spectrum.

Burch took a comprehensive history which included representations that claimant met his developmental milestones. She noted Dr. Bennett's diagnosis of Asperger's Disorder. She obtained considerable behavioral information from claimant's father including current levels of functioning. Burch reviewed educational materials. She was not told by claimant's father that he disbelieved the results of the testing and assessments, or that he had any reason to believe they were invalid.

Burch observed claimant during the interview, finding him to be a "darling" boy who was active, friendly and quite busy exploring the conference room during the interview process. Claimant was slightly intrusive, interrupting the interview on occasion and asking irrelevant questions. Claimant did not exhibit the kinds of symptoms or behaviors Burch had come to associate with of persons diagnosed with disorders on the autistic spectrum who had a substantial disability.

Burch concluded additional information, if any, should be obtained and all information should be submitted to the service agency's Eligibility Review Group. She believed claimant "might benefit from an RCOC Team or Medical Assessment to rule-out or confirm a substantially handicapping diagnosis of Autism."

25. Arlene Downing, M.D. (Dr. Downing) holds a medical degree from USC. She is a board certified pediatrician who specializes in the evaluation and treatment of developmentally disabled persons.

Before December 14, 2005, Dr. Downing carefully reviewed the materials and information obtained from the school district and claimant's parents. She did not meet personally with claimant or with claimant's parents.

Based on her education, training, experience and review of pertinent materials, Dr. Downing concluded there was no need for claimant to be seen and evaluated in a face to face meeting by a multi-disciplinary team because there was absolutely no evidence that claimant had a substantial disability arising out of any disorder on the autistic spectrum.

26. Mary Parpal, Ph.D. (Dr. Parpal) holds a doctorate in Psychology from Stanford University. She has been associated with or employed by the service agency for the past ten years. Dr. Parpal specializes in the evaluation, assessment and treatment of persons with developmental disabilities, including disorders on the autistic spectrum.

Before December 14, 2005, Dr. Parpal carefully reviewed the materials and information obtained from the school district and claimant's parents. She did not meet personally with claimant or with claimant's parents.

Based on her education, training, experience and review of pertinent materials, Dr. Parpal concluded there was no need for claimant to be seen and evaluated in a face to face meeting by a multi-disciplinary team because there was absolutely no evidence that claimant had a substantial disability arising out of any disorder on the autistic spectrum. Claimant's disability, which was in the area of self-direction, anger management, attention seeking, and oppositional defiant behaviors, was due to behavioral deficit best characterized as ADHD, and not a developmental disability.

Dr. Parpal was suspicious of Dr. Bennett's diagnosis of Asperger's Disorder, but even if that diagnosis were valid, there was no evidence claimant's condition constituted a substantial disability.

27. On December 14, 2005, the service agency's Eligibility Review Group met to discuss claimant's eligibility for regional center services and supports. The team included Burch, an intake area manager and a registered nurse. Dr. Downing and Dr. Parpal were members of the team, and while their comments and opinions were shared with the group, they were not present at the meeting.

After reviewing and discussing all available information, it was determined clamant did not have a substantial handicap in at least three major life areas including the capacity for independent living, self-direction, economic self-sufficiency, communication, self-care, mobility and learning. Specific reasons for the determination were provided. The team's written report concluded claimant was ineligible for services and supports from the Orange County Regional Center "as a function of the lack of a substantially handicapping, RCOC eligible diagnosis."

Burch advised claimant's mother's of the service agency's determination by telephone. A detailed letter dated December 14, 2005, confirming the determination was sent to claimant's parents. That letter advised claimant's parents of the right to appeal.

The Expert Testimony

28. Burch, Dr. Downing and Dr. Parpal provided expert testimony at the fair hearing. Each concluded claimant did not have a condition that was substantially

disabling which arose out of mental retardation, cerebral palsy, epilepsy, autism, or another disabling condition closely related to mental retardation or requiring treatment similar to that required for mentally retarded individuals. Besides the expert testimony not supporting the existence of a substantially disabling condition, the preponderance of the expert evidence called into question any diagnosis on the autistic spectrum.

29. The evidence offered to support of claimant's diagnosis of autism or Asperger's Disorder was limited to the conclusions reached by claimant's parents and advocate, Dr. Bennett's single sentence statement on a prescription pad for which there was no support, and the "medical diagnosis" of "Autism" from an unidentified source in the initial evaluation of Newport Language and Speech Centers, a diagnosis that was later abandoned.

30. The evidence claimant offered to support a finding of "substantial disability" included testimony from claimant's father to the effect that claimant suffered some developmental delays in speech and mobility (which were not corroborated) and observations about claimant's problematic behaviors. Claimant's father testified claimant was a "good kid" who was a "lot of work," "hard to understand why he does things," was "sometimes angry," had a "warped sense of reality," did poorly in school, was somewhat limited in his self-care, had difficulty in peer relationships, and lacked direction. This testimony was sincerely given, but it was not expert testimony and it did not establish a "substantial disability" under the Welfare and Institutions Code or Title 17 of the California Code of Regulations.

The contemporaneous information set forth in the educational assessments was more reliable than developmental and behavioral information that was retrospective in nature. That information, while not necessarily untruthful, was not fresh. Issues of undue influence and secondary gain cast some doubt on it.

There is no question that managing claimant is a challenging and exhausting task. Claimant's problem behaviors create enormous stress on the family and on the parents' marriage. There is also no question that claimant's parents love claimant very much and want the best possible outcomes for him.

Evaluation

31. The expert witnesses in this matter testified credibly. Each expert witness possessed special knowledge, education, skill, experience and training in the diagnosis of autism and other disorders on the autistic spectrum. Each expert had good reasons for her opinions. The documentary evidence relied on to establish claimant's diagnosis of autism and/or Asperger's Disorder was incomplete and in some instances inconsistent.

Claimant failed to show by a preponderance of the credible evidence that he possesses a valid diagnosis of autism or Asperger's Disorder under the *DSM-IV-TR*.[3]

Even if such a diagnosis were to exist, it was not established that claimant suffers a substantial handicap related to any developmental disability. Claimant's handicaps are related to behavioral conditions that are not associated with a developmental disability.

32. Given the extensive credible information provided to the service agency during the intake process, there was no need for claimant to be evaluated in a face to face interview by Dr. Downing, Dr. Parpal, or other physicians and licensed psychologists. Under all the circumstances, doing so would have wasted the valuable time of service agency evaluators and its resources.

33. At the fair hearing, the service agency offered to have claimant seen by a service agency physician and psychologist and to have this matter taken off calendar. Claimant's advocate insisted that this matter go to a final decision.

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[3] The DSM-IV-TR criteria for Asperger's Disorder are:

A. Qualitative impairment in social interaction, as manifested by at least two of the following:

(1) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction
(2) failure to develop peer relationships appropriate to developmental level
(3) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest to other people)
(4) lack of social or emotional reciprocity

B. Restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:

(1) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal in either intensity or focus
(2) apparently inflexible adherence to specific nonfunctional routines or rituals
(3) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting or complex whole-body movement)
(4) persistent preoccupation with parts of objects

C. The disturbance causes clinically significant impairment in social, occupational, or other important areas of functioning.

D. There is no clinically significant delay in language (e.g., single words used by age 2 years, communicative phrases used by age 3 years).

E. There is no clinically significant delay in cognitive development or in the development of age-appropriate self-help skills, adaptive behavior (other than in social interaction), and curiosity about the environment in childhood.

F. Criteria are not met for another specific Pervasive Developmental Disorder or Schizophrenia.

LEGAL CONCLUSIONS

1. "Developmental disability" is defined in Welfare and Institutions Code section 4512, subdivision (a) (see, Factual Finding 5) and in California Code of Regulations, title 17, section 54000 (see, Factual Finding 6). The definition in the code and regulations require there to be a "substantial disability."

2. "Substantial disability is defined in California Code of Regulations, title 17, section 54001. It means a condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential, and the existence of significant functional limitations (as determined by the regional center" in three or more of the following areas of major life activity, as appropriate to the person's age: (A) Receptive and expressive language; (B) Learning; (C) Self-care; (D) Mobility; (E) Self-direction; (F) Capacity for independent living; and, (G) Economic self-sufficiency. By regulation, the assessment of substantial disability must be made by a group of regional center professionals of differing disciplines and which must include as a minimum a program coordinator, a physician, and a psychologist. See, Factual Finding 7.

3. Nothing in the Lanterman Act or in Title 17 of the California Code of Regulations requires a physician, psychologist or other professional personally to meet with an individual who seeks regional center services and supports.

4. The Legislature used the generic term "autism" to describe a kind of developmental disability in enacting the Lanterman Act. It did not use the more specific term "autistic disorder."

Today the term "autism" includes more disorders than were defined when the Lanterman Act was passed, but the purpose of the Lanterman Act remains the same - to support the integration of developmentally disabled persons into the mainstream life of the community, to prevent their dislocation from their families and community by providing to the maximum extent feasible the services and supports sufficiently complete to meet the needs and choices of each person with a developmental disability regardless of age or degree of disability. This legislative purpose is best obtained by taking a broad view of the term "autism."

"Autism" under the Lanterman Act should not be strictly limited to the *DSM-IV-TR* diagnosis of Autistic Disorder, but should encompass all disorders along the autism spectrum when a showing is also made that such a disorder constitutes a substantial handicap for an individual. This conclusion recognizes that Asperger's Disorder does not necessarily constitute a substantial disability for all who have that diagnosis. See, Factual Findings 4-13.

5. Claimant failed to produce sufficient credible evidence to establish that he meets the criteria for a diagnosis of Autistic Disorder or Asperger's Disorder under the *DSM-IV-TR*. Whatever the origin of claimant's behavioral disorder, it is not an autistic spectrum disorder. Even if it were, it is not substantially handicapping. Claimant is not entitled to receive regional center services and supports on the basis of the credible evidence presented at the fair hearing in this matter.

This conclusion is based on Factual Findings 1-32 and on Legal Conclusions 1-4.

ORDER

Claimant Marshall O.'s appeal from the Regional Center of Orange County's determination that he is not eligible regional center services and supports is denied. Claimant is not eligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act.

NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.

DATED: _____

_____
JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings